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Brf. of Maxey & Hutchings for P. E.

SUPREME COURT OF THE UNITED STATES

Filed Dec. 31, 1900.

OCTOBER TERM, 1900.

W. P. H. McFADDEN, *et al.*,
Plaintiffs in Error,

VERSUS

EVANS-SNYDER-BUEL CO., *et al.*,
Defendants in Error.

No. 520

Brief on Behalf of Plaintiffs in Error.

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STATEMENT.

This suit was instituted by the plaintiffs in error on the 17th day of June, 1896, and the attachment sued out therein was levied on 6775 head of cattle. Immediately thereafter, Evans-Snyder-Buel Company filed the interpleader's bond and affidavit and took possession of the cattle under *sections 390 and 301 of Mansfield's Digest* of the Laws of Arkansas, which are as follows:

"*Sec. 390.* When a sheriff shall levy a writ of attachment upon property claimed by a person not a party to the writ, such person may make oath to the property, and the same shall be delivered to him upon his giving bond in favor of the plaintiff, with security, to be approved by the sheriff, in a sum double the value of the property attached, which value

shall be ascertained by the oaths of two citizens of the county where the writ is levied, to be chosen by the sheriff."

"*Sec. 391.* Such bond shall be conditioned that the said claimant will interplead at the term of the court to which said writ shall be returnable; that he will prosecute such interpleader to judgment without delay, and if, on the trial of such interpleader, the said property shall be found to be the property of the defendant in such writ, and the plaintiff shall recover judgment against said defendant, the property shall be delivered to said sheriff or his successor in office whenever demanded by such sheriff, after execution upon such judgment comes to his hand to be levied thereon. In case the property so levied upon shall not be delivered as aforesaid, said bond shall have the force and effect of a judgment for the amount of the appraised value of such property and the costs of the interplea, if such appraised value be less than the amount of the judgment rendered in the original case, and, if more, for the amount of said judgment and costs, on which judgment execution against all the obligors may issue."

The interplea, however, required by the foregoing sections was not filed until January 27th, 1897. *(Record p. 2).* Two days thereafter a judgment was entered against the defendant in the suit, J. R. Blocker, for the sum of $55,875.71, at which time also was rendered a judgment sustaining the attachment. The interpleader claimed the cattle under certain mortgages given by said Blocker, who, as shown by the mortgages themselves, as well as the testimony in the case, was and is now a resident of Bexar county in the State of Texas, in which county some of the mortgages relied on had been duly executed and recorded. The cattle in question were situated in the Creek Nation, Indian Territory, and said mortgages were again recorded in the Northern District of the Indian Territory, at Muskogee and in the Creek Nation. The cattle were, at the time of the levy, in the possession of the mortgagor, J. R. Blocker. There have been several trials in this case, but at the last trial in the Northern District, where the plaintiff for the second time lost their suit, it was agreed *(Record, p. 48)* that in case the judgment should be reversed by the

United States Court of Appeals for the Indian Territory, judgment should be rendered against the interpleader by that court. The judgment was reversed and the United States Court of Appeals, pursuant to said agreement, on the 4th day of January 1900, *(Record, p. 80)*, entered judgment against the interpleader and its bondsmen for the sum of $72,250.35, from which judgment the interpleader prosecuted its writ of error to the United States Court of Appeals for the Eighth circuit. At the time the attachment in this suit was levied upon the cattle in controversy the following laws in relation to the registration of chattel mortgages were in force in the Indian Territory, being *Sections 4742 and 4743 of Mansfield's Digest.*

"*Sec. 4742.*' All mortgages, whether for real or personal, estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"*Sec. 4743.* Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed (b) in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

As we have stated before, the attachment in this case was sustained on the 29th day of January, 1897. On February 3, 1897, three days thereafter, Congress amended the law above quoted by an enactment which reads as follows:

"*Sec. 4742 of Mansfield's Digest of the laws of Arkansas*, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the Judicial District in which the property is situated at the time the morgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the Judicial District thereof in which the prop-

erty was situated at the time they were executed are hereby validated."

U. S. Stats. at Large, 1896–7, p. 510.

The Circuit Court of Appeals reversed the judgment of the United States Court of Appeals for the Indian Territory and affirmed the judgment of the United States Court for the Indian Territory, Northern District.

ASSIGNMENT OF ERRORS.

The United States Court in the Indian Territory, Northern District, erred in

I.

Admitting in evidence the mortgages marked "exhibits A, B, C, and D."

II.

In permitting the witness Atwater to testify as follows:

"Q. Mr. Atwater please state to the court and jury whether if you know as a matter of fact it was Blocker's money that bought these cattle for which these mortgages were executed or whether it was money of Evans-Snider-Buel Co? Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advances the principal? A. Evans-Snider-Buel Co. advanced the money. Q. Did the Evans-Snider-Buel Co. advance all the money that went into these cattle? A. Yes, sir; all of it."

III.

In directing the jury to return a verdict for the interpleaders.

IV.

In overruling the motion for a new trial and in entering judgment on the verdict in this case against plaintiff's objections.

And the said United States Circuit Court of Appeals for the Eighth Circuit erred,

I.

In reversing the judgment of the United States Court of Appeals for the Indian Territory.

II.

In affirming the judgment of the United States Court in the Indian Territory, Northern District because of each several errors of the latter court as to its action and rulings, as to each and every one of the errors above specified.

BRIEF OF ARGUMENT.

I.

Registry Laws Have No Extra Territorial Force.

The Court erred in admitting in evidence the chattel mortgages marked Exhibits "A," *(Record, p.)*, "B," *(Record, p.)*, "C," *(Record, p.)*, "D," *(Record, p.)*.

These deeds were made, executed and recorded in the States of Texas, when the cattle were located in the Indian Territory. To fix any lien on them in the Territory under such conditions, the laws in force in said Territory had to be fully complied with, for the cattle were not brought to the Territory fraudulently, but with the consent of the mortgagee. Therefore, comity will not protect any rights acquired under the Texas mortgage, if any indeed could have been acquired.

Pycatt vs. Powell, 2 C. C. A. 367, 51 Fed. 551.

Corbett vs. Littlefield, 11 L. Rep. Ann., 95.

Hall vs. Pillow, 31 Ark., 32.

Pope vs. Hanks, 40 N. E. 839.

When the deeds were recorded in the Indian Territory they were not a lien, as we had no law to record mortgages given by non-residents. The mortgages offered in evidence show on their face that the mortgagor was a resident of the State of Texas. The law was construed in Arkansas before it was adopted by Congress.

Watson vs. Thompson Lumber Co., 49 Ark., 83.

Jones on Chattel Mortgages, Section 248.

That construction binds this Court.

Sanger vs. Flow, 1 C. C. A., 56, 48 Fed., 152.

Appollos vs. Brady, 49 Fed., 401.

McClellan vs. Pyeatt, 50 Fed., 686.

Rainwater Hat Co. vs. Malcolm, 51 Fed., 734.

Hogg vs. Emerson, 6 How., 483.

Stutsman Co. vs. Wallace, 142 U. S., 295.

II.

The Law as Amended was Not Retroactive.

In order for the interpleader to recover it is necessary for it to convince the Court that the amendment quoted previously was not only retroactive, but that it was such a law as did away with the attachment lien of the plaintiffs.

(a) The terms are not necessarily retroactive.

We must construe all the amendment together. It was not a curative act solely. It did not purport to be enacted for the purpose of curing mistakes made in an endeavor to comply with an existing law. It first enacts a new law, whereby mortgages given by non-residents could be recorded so as to fix a lien, which would be notice of its existence to all the world. It went further and provided for the validation of such mortgages theretofore put on record. Under what law did they become valid? Certainly under the law just then enacted, and whose life could not extend back one day. It is not at all like a law which purports to cure defects for non-compliance with a law which existed and authorized the act at the time it was done, but which was not fully complied with.

February 3, 1897, was the first time the mortgage of a non-resident could have legally been put on record, and from

that moment only could life be put into those lifeless ones hitherto written on the books of record.

Newgass vs. Atlantic & D. Ry. Co., 56 Fed., 676.

The main law is clearly prospective in terms, and the validating clause following it must be similarly construed. It ratified what was void and cured the defect from the date of ratification.

Black on Interpretation of Laws, p. 253.

One of the many briefs written in behalf of the plaintiffs in error has found much food for reflection as well as occasion for argument in the fact that the amendment of *Sec. 4742* validates mortgages "heretofore" executed and recorded in the Judicial District, etc. In *Summer vs. Mitchell, 10 So. Rep., 562*, the Court was considering an Act in which the word "heretofore" occurred and which tended much more strongly to give the Act retroactive force than the use of it in the law under consideration. The Act was as follows: "That any deed of conveyance heretofore executed and acknowledged in compliance with the previous provision of the Act shall have the same force and effect and be as valid as if the same had been executed after its passage." The Court, although strongly urged to do so, refused to say more than that the effect of the Act was to validate at least from its approval any prior acknowledgement made out of the State of a deed conveying land located in the State.

Wade on Retroactive Laws, Secs. 255 and 266.

McCracken vs. San Francisco, 16 Cal., 591.

(b) *Both new statutes and amendments must be construed prospectively unless the language is imperatively to the contrary.*

Merchant's Bank vs. Ballou, 32 S. E., 482.

Black's Constitutional Prohibitions, Sec. 179.

Wade on Retroactive Laws, Secs. 34-39.

3 American and English Enc. of Law, p. 758, note. (New Ed.)

7 American and English Enc. of Law, pp. 681, 758, 761.

Peck vs. Jenness, 7 How., 845.

Rogers vs. Lynch, 29 S. E., 507.

Chew Heong vs. U. S., 112 U. S., 536.

Dugger vs. Mechanics and Traders Ins. Co., 32 S. W. Rep., 5.

Parson vs. Pain, 26 Ark., 124.

Fayette Building and Loan Ass'n vs. Bowles, 39 S. W., 1046.

Boylon vs. Kelley, 36 N. J. Eq., 331.

Goshen vs. Stonington, 10 Amer. Dec., 121.

Gaston vs. Merriam, 33 Minn. 278; 22 N. W., 614.

Bernier vs. Becker, 73 Ohio St., 72.

III.

Power of Congress to Pass Retroactive Laws.

Congress has power to pass such laws for many purposes, while on the other hand it is restricted in passing them in other instances.

For the purpose of this case it is sufficient to maintain that it cannot pass such laws which have the effect of divesting vested rights. This inhibition was imposed by the Fifth Amendment to the Constitution, which declared that no person should be deprived of his property without due process of law.

The Fourth and Fifth Amendments are limitations upon Federal, and not upon State, power.

Weimer vs. Bermberry, 30 Mich., 201.

Wade on Retroactive Laws, Secs. 156, 157, 264.

Steamship Co. vs. Joliffe, 2 Wall, 450.

Fletcher vs. Peck, 6 Cranch, 87.

Memphis vs. U. S., 7 Otto, 293.

7 Lawson's Rights and Remedies, Sec. 3850.

Black on Const.—Prohibitions, Secs. 176, 183, 207.

Sutherland on Statutory Construction, Sec. 480.

3 Amer. and Eng. Enc. of Law, pp. 759-760.

The Society, etc., vs. New Haven, 8 Wheat, 493.

Wilkinson vs. Leland, 2 Peters, 657.

Ferguson vs. Williams, 13 N. W. Rep., 49.

"If the language used required such a construction, it could not be effective to deprive a party of prior vested rights acquired under the levy."

Williamson vs. N. J. S. Ry. Co., 29 N. J. Eq., 335.

The cases of *Watson vs. Mercer, 8 Pet., 88*, and *Satterlee vs. Matthewson, 2 Pet., 380*, are relied on in the briefs of counsel for the interpleader. These cases arose under State laws, and at the time they were decided there was no clause in the Constitution of the United States prohibiting the State from passing laws that had no other effect than to divest vested rights. No such decision would now be rendered since the Fourteenth Amendment to the Constitution. Nor would any such have been made had the act under consideration in those cases been passed by Congress, for Congress was forbidden as we have shown above, from passing laws divesting vested rights. In other words there was nothing in the act involved in these cases in violation of the Constitution of the United States as it then stood, and that was the only error the Court could pass on. These decisions are merely to the

effect that a *State* Statute at that time, otherwise not amenable to constitutional objection, was not against the Federal Constitution upon the sole ground that it divested or destroyed vested right.

We have endeavored to show that as the Constitution of the United States now stands the United States and the States stand under it upon the same footing so far as the power to pass legislation injurious to vested rights is concerned. In 1893, the Legislature of Virginia, curing certain defects in acknowledgements, provided that "the record of any such deed of writing heretofore made shall, in all respects be deemed valid." The Court, after stating that no statute will be given a retroactive operation unless there is something on the face of the enactment, putting beyond a doubt that such was the purpose of the Legslature, proceeded to consider the power of the Legislature to enact any laws affecting liens acquired before the passage of the Act, and in passing upon that question makes this statement: "There can be no doubt that a judgment is such a vested right of property that the Legislature cannot, by a retroactive law, either destroy or dimish its value." It was contended in that case, also as is contended in this, that such a law merely affected or modified the remedy for the enforcement of the judgment, but the Court took a different view of the law and stated that no such specious reasoning could avail to destroy by a retroactive law a lien which alone gave the judgment its life and value.

Merchants Bank vs. Ballou, 32 S. E. Rep., p. 481.

Randall vs. Kreiger, 23 Wall., 137.

Wade on Retroactive Laws, Secs. 159, 191, 261.

A somewhat similar case, though one which originated in the Federal Court, decided that state legislation "may sanction past transactions, where vested rights are not disturbed."

Leland vs. Wilkinson, 35 U. S., 294; L. Ed. 430.

What then is a vested right?

Says the Supreme Court of the United States in *Steamship Co. vs. Joliffe, supra:*

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does no affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Wade in Sec. 157, p. 190 of his work on *Retroactive Laws* says:

"Any right or thing which may be owned, bought, sold or assigned may be considered as a *vested* right, in the sense that the owner cannot be deprived of it otherwise than by 'due process of law' or 'the law of the land.' Unless something answering the description of *due process of law* is required by a retrospective statute which authorizes the transfer of a private right from one person to another, this provision of the Constitution is clearly violated, whether the right arose in contract or not."

It is thus defined by *Mr. Black, in Sec. 154* of his work on *Constitutional Law:*

"Vested rights are rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of another private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of proceedure and for the public welfare. A vested right, as distinguished from an interest in expectancy or a contingent interest, is a right of action or property immediately fixed in some particular person or persons."

See also:

Fletcher vs. Peck, 6 Cranch, 87, L. Ed. 162 notes.

Goshen vs. Stonington, 10 Amer. Dec., 134.

Lowe vs. Harris, 17 S. E., 539.

Grove vs. Todd, 20 Amer. Reps., 79.

3 Amer. and Eng. Enc. of Law, 758.

IV.

An Attachment Lien Perfected By Judgment is a Vested Right.

The attachment levied in this case was sustained and perfected on the 29th day of January, 1897, five days before the passage of the Act of Congress relied on to defeat the lien. The only question to consider then in determining our rights is, did we then have a vested right, and from what time did the right date.

The attachment was issued on the 17th day of June, 1896, and was levied on the property in question June 29, 1896, (*Record, p. 38.*)

"A judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or rather it takes the place of such lien and relates back to the time of the levy, and takes priority over all subsequent attachments, liens or conveyances."

1 Shinn on Attach., Sec. 452.

Waples on Attach., 2d Ed., Sec. 17.

Frellson vs. Green, 19 Ark., 376.

Bergman vs. Sells, 39 Ark., 97.

Cole vs. Cunningham, 133 U. S., 107.

"The attaching creditor has a vested right which the debtor cannot impair. The inchoate lien created by attaching becomes perfected by judgment which relates back to the seizure so as to make the lien a perfect one from the beginning."

Waples on Attach., 2d Ed., Sec. 736.

The same author, in his first edition, on *pages 580 and 581*, says:

"If matured by judgment, the lien becomes perfect; rather, it now has the character of a perfect lien from the date of its contingent creation. * * * By the law of relation an attachment judgment retroacts to the time the property was first attached. * * * Such retroaction makes the lien perfect from its first inception as though created by the contract of the parties, as though it were a mortgage lien voluntarily put upon the property by the defendant himself."

The authorities all agree that the lien of an attachment stands on as high ground as the lien of a properly levied execution, or any incumbrance that can be given by the voluntary act of the parties; and no intervening legislation can interfere with or destroy it. A court of respectable authority has, with great weight of reason, decided that an attachment lien, even before judgment, cannot be affected by a subsequent repeal of the law.

Mulnix vs. Spratler, 50 Pac. 1078.

Madden vs. Day, 48 Pac. Rep., 1053.

Willis vs. Croker, 1 Pick., 204; 18 Mass., 204.

Griggs vs. Banks, 59 Ala., 311.

Such might, too, be inferred from the language used in *Harrison vs. Trader, 29 Ark., p. 92:*

"But in attachment liens, the right grows from and inheres in the law, and the act of plaintiff in bringing suit properly, and the clerk in issuing the writ, and the sheriff in levying it on defendant's property as the law directs. These acts being performed, the lien, though inchoate, is perfect and substantial; as much so as the lien of a mortgage when properly executed, acknowledged and recorded; as much as a mechanic's lien, when the work is done, and the lien proven and filed in the clerk's office, as the law directs; as perfect as a vendor's lien, where his purchase money is unpaid for real estate."

But this Court while saying that "such lien is a substan-

tial and valuable security," maintains that the only way to preserve the lien upon a repeal of the statute would be by a saving clause, excepting pending attachments from the effect of the repealing clause. But it cannot be inferred from this that anything short of a repeal of the law, a dissolution by judgment or voluntary act of the parties could destroy or impair the lien acquired by the levy.

National Bank of Com. vs. Riethmann et al., 79 Fed. Rep., 582.

The opinion, then, announces the doctrine for which we are contending, as follows:

"An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution."

The Supreme Court of Arkansas puts it even more strongly when construing our own statute:

"The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment, and which could not be divested by any change in the status of the parties."

Richardson vs. Adler, 46 Ark., 49.

Wade on Retroactive Laws, Secs. 171, 173.

This question came before the Supreme Court of Montana, where it was contended that an amendment to the attachment law was retroactive, and annulled certain attachment liens acquired and existing prior to the passage of the amendment, but the Court held the contrary. "It would give the statute under consideration the retroactive effect of abrogating the liens lawfully acquired by attachment, and existing when the present statute was enacted."

Ryan vs. Maxey, 35 Pac., 515.

Gunn vs. Barry, 15 *Wall.,* 610.

Even more directly to the point at issue is the following from the Supreme Court of Wisconsin:

"The act is in express terms retroactive. * * * The plaintiffs had not acquired by the service of the garnishee process any right to the remedy they had invoked, which could not be taken away from them by the act in question. The remedy was given by statute, and until *proceedings had passed into judgment*, the Legislature might change it, or take away the right of action altogether."

Freeberg vs. Singer, 90 Wis., 608; 63 N. W., 755.

The converse must unquestionably be true, that if it had passed into judgment as ours had, the Legislature could not have changed or taken it away. This conclusion is sustained by the best authority.

Endlich on Interpretation of Statutes, Sec. 281.

Hannah vs. Felts, 15 Iowa, 141.

Brenton vs. Severs, 12 Iowa, 389.

Hall vs. Stevens, 65 Mo., 670.

Kelly vs. Dill, 23 Minn., 435.

Tillotson vs. Millard, 7 Minn., 513.

Williamson vs. N. J. Ry. Co., 29 N. J. Eq., 311.

Grove vs. McDaniel, 1 McCord, 480.

People vs. Cameron, 7 Ill., 468.

Lyon vs. Sanford, 5 Conn., 547.

Myers on Vested Rights, p. 138 et seq.

Chestnut vs. McShane, 16 Ohio, 599.

1 Amer. Eng. Enc. of Law, p. 564, new edition.

3 Amer. Eng. Enc. of Law, p. 218, new edition.

1 Freeman on Judgments, Sec. 298.

1 Black on Judgments, Sec. 298.

Com. vs. Rosche, 40 Amer. St. Rep., 1653.

Lackey vs. Seibert, 23 Mo., 85.

But we have higher authority than all those. The Supreme Court of the United States has considered the same question in *Tyrell vs. Rountree*, *7 Pet.*, *464*. Speaking through that greatest of judges, Ch. J. Marshall, it said:

"An interest was vested in him for the purpose of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment and was already condemned by the judge of a competent tribunal. The subsequent division of the county could not divest this vested interest, or deprive the officer of the power to finish a process which was rightly begun."

The case relied on by interpleaders in the lower Court, and the one upon which the Court principally based its decision, was *Green vs. Abraham*, *43 Ark.*, *420*.

That case did not construe any statute involved in this case, or put in force in the Indian Territory, and it is only authority so far as it is intrinsically entitled to weight as such. If, therefore, it is not based either on authority or sound reasoning, it must not be followed. Not only can we readily show both, but show further that its conclusions contravene both the authorities it cites and its own, as well as all other sound reasoning, if it is not susceptible of the construction placed on it by the Court of Appeals in the Indian Territory in its first opinion. In that case judgment had been obtained and execution levied on property upon which was a mortgage, which had not been properly recorded. The property (corn) was seized by the constable under his execution in October, 1882, the defectively acknowledged deed of trust on it having been executed March 1, 1882.

On March 8, 1883, an act was passed healing the defective acknowledgement. The case was tried in August, 1883. The Supreme Court at its November term, 1884, held that

the deed "imparted no notice to subsequent purchasers or incumbrancers." It further said that "such healing acts are not permitted to interfere with or disturb vested rights."

But it said that no vested right was acquired by the levy of the execution. If, then, the lien of an execution is a vested right, the decision is in the teeth of its statement of the legal principle.

In *McKeithan vs. Terry*, *64 N. C.*, 25, the Court said that by the levy of an execution the plaintiff acquired a "specific lien"—a "vested right."

"Nothing less than the satisfaction of the debt, or some recognized act of abandonment, or waiver, either by the creditor or officer, can have the effect to destroy the title vested by the levy."

Herman on Executions, *Sec.* 172.

"The right of the judgment-creditor to have satisfaction becomes vested by the levy of his execution. This right is treated as property, because it is of the same essential nature as other property, and a statute which undertakes to supersede the right by validating a lien which could not have been interposed when the levy was made, is obnoxious to the objection that it is a law depriving one of his property otherwise than by due process of law, or the law of the land."

Wade on Retroactive Laws, *Sec. 168.*

"The rights of the Iron and Coal Company in the property in controversy were fixed and became vested rights in January, 1874, when the levy was made under the executions. By the act concerning executions, the property was bound by the execution from the time of delivery to the sheriff, and upon levy made, title under the execution would be good, even as against subsequent *bona fide* purchasers. (*Rev. St.*, *p.* 392, *S.S.*, 18–20.) By force of the last mentioned act, and the act concerning chattle mortgages, as it then stood, the Iron and Coal Company, upon the levy being made, acquired a right to the property seized under its execution superior to that of the complainant under his mortgage. That right of property,

being a vested right, was not divested by the act of 1876.

* * * * * *

"Indeed, a right partaking of the nature of property, such as became vested in the Iron and Coal Company upon the levy of its execution, is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation, for either public or private purposes."

Williamson vs. N. J. Ry. Co., 29 N. J. Eq., pp. 333-334.

See also *Warren vs. Johns, 9 S. C., (9 Rich), 288.*

There cannot be found any case where the doctrine is more strongly stated against that case than in *Gunn vs. Barry, 15 Wall.*, 610 *L. Ed.*, 212:

"But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact."

In Virginia, where a judgment is a lien on all the debtor's real estate without the levy of an execution, the Supreme Court of that State said: "The lien had become fastened on the land before the appellant acquired, etc. * * * It was a vested right."

Kennerly vs. Swartz, 37 S. E. Rep., 348.

Merchants' Bank vs. Ballou, 32 S. E., Rep., 481.

(a) *The judgment sustaining the attachment was in proper form.*

It is urged in view of the language of some of the cases cited, that our judgment was incomplete because it did not

condemn the property to sale, or provide for a special execution. An order of sale was neither necessary nor proper, for the property had been taken under *Section* 390 *of Mansfield's Digest*, and no order could be made until the trial of the interplea, when all proper orders should and would be made under *Sections* 351 *and* 391. Under those sections, as well as under the general attachment procedure, no order of sale is necessary, as the law imposes that duty upon the sheriff any way.

Mansfield's Digest, Secs. 347, 380.

Anderson vs. Goff, 1 Amer. St. Rep., 34.

Waymant vs. Dodson, 12 Iowa, 22.

With us, an attachment is a purely ancillary remedy, and it is simply to secure the satisfaction of the judgment in the main issue.

Ferguson vs. Glidewell, 48 Ark., 200.

Under our practice, the lien is perfected when the attachment is *sustained.*

"By levy of the attachment and judgment *sustaining* the same, such inchoate lien is perfected."

Cross vs. Fombey, 54 Ark., 183.

Richardson vs. Adler, 46 Ark., 49.

A special execution is no longer issued under our practice. Its necessity was done away with in Arkansas by the adoption of the Civil Code.

Field vs. Dorch, 34 Ark., 407.

Waples on Attachments, 1st Ed., p. 506.

Wallace vs. Bogel, 2 S. W., 96.

Van Diver vs. Buckley, 1 So. Rep., 633.

V.

The Attaching Creditor in This Case Stood on the Same Footing as a Purchaser for Value.

Much stress was laid on this feature of the case in argument below, and the changes were time and again rung on that expression of Mr. Cooley in his work on *Constitutional Limitations* (*5th Ed., p. 466*), where he states that the operation of such curative statutes must be restricted to the parties to the original contract and "to such other persons as may have succeeded to their rights with no greater *equities*."

Now, it is true that an attaching creditor takes his rights subject to all outstanding equities of which he has notice, but let us see what equities, if any, the interpleader had. *Its* right, if good against third parties, was a legal one; if bad, it was none at all. In other words, a legal title which the law declares fraudulent, can never be converted as against the same parties, in a good, equitable one. The doctrine of equities comes in, where, at the time of the levy, the debtor had no interest in the property. Where fraud in law or fact enters into the transfer, the law says the title never passed out of the debtor and the property is subject to levy.

The only way for Blocker to have been divested of his title as against third persons, or his creditors, was by the interpleader's taking possession under the mortgages, or in lieu thereof, complying, if it could, with the recording laws. (*Rainwater-Brogher Hat Co. vs. Macolm, 51 Fed. Rep., 734*). Neither was done, and as to all third persons, the title remained in Blocker. It is useless to multiply authorities to show that under our practice an execution creditor, and even an attaching creditor, before judgment on his debt can defend against and attack the fraudulent transfers of his debtor.

1 Shinn on Attachments, Sec. 320.

The rule as to equities, as we have before stated, has no

application here. If, at the time of the levy, the debtor has no interest in the property, the attaching creditor is not in the position of a *bona fide* purchaser, and superior equities would prevail; but if the debtor *previously* had a *legal* title, and has fraudulently divested himself of it, then the attaching creditor is on a different footing; he is not simply a creditor at large, but a creditor having a specific lien on the property attached.

Bostwick vs. Blake, 34 N. E., 38.

1 Shinn on Attachments, p. 615.

"And in a subsequent case, where a sheriff was sued by one claiming attached property under an assignment from the defendant, which the sheriff alleged to be fraudulent as against the defendant's creditors, that court held that an attachment in the hands of an officer authorized him to seize any property which the defendant had disposed of in any manner with intent to defraud his creditors; that the attaching creditor was not, after service of his attachment, to be deemed a mere creditor at large, but a creditor having a specific lien upon the goods attached; and that the sheriff, as his bailee, had a like lien, and had the right to show that the assignee's title was fraudulent as against attaching creditors."

Drake on Attachments, 6th Ed., Sec. 225.

Tennant vs. Watson, 58 Ark., 252.

The interpleader here never at any time had any title to the property in question against these parties. The mortgages under the recording acts being void as to all sorts of creditors, the interpleader neither acquired any title or any equity in opposition to their claims. As to attaching creditors, the title remained in Blocker the same as though no mortgage was ever given.

Pingrey on Chattel Mort., Sec. 800.

(a) *Mortgages in question were fraudulent and passed no title.*

One of the counsel for interpleader contends that there was no law at all here at the time of the recording of the mort-

gages, with reference to the recording of mortgages given by non-residents, and that the common law on the subject prevailed. All the statutes he invokes to aid him stood in Arkansas as they stand in the Indian Territory, and it was in the light of them all that the decision in *Watson vs. Lumber Co., 49 Ark., 83*, was rendered. That case decided that a mortgage, (in exactly the same predicament as the ones in controversy were prior to the passage of the so-called curative act, relied on by the interpleader) "was not valid against the creditors who sued out executions and caused the same to be levied before the commencement of this action, as to the personal property levied on." Such mortgages then stood on the same ground as all other chattel mortgages, and the statute (*Mansfield's Digest, Sec. 4742*) said that all such shall be "recorded in the county in which the mortgagor resides."

It is useless to cite authority on the proposition that such mortgages in this jurisdiction, not recorded, did not constitute a lien as against creditors, even though they may have had actual notice of their existence. The reason of this is that the recording act made such mortgages fraudulent as to third parties, and a fraudulent mortgage never conveys title against attaching, or any other sort of creditors. This question was clearly settled in Arkansas in a very early day.

"The attachments found the rights of the mortgagee in an inchoate and imperfect state, subject to be divested either by a subsequent purchaser or a judgment creditor, and transferred it into the custody of the law, with all its imperfections upon it, to await the final judgment of the law. The instant it passed into the custody of the law it went out of the reach of all persons having mere inchoate rights, and those rights, if not utterly destroyed, must at least remain in abeyance until the property shall be legally released from the grasp of the attachment. The law regards a mortgage which has not been acknowledged and filed for record, as a fraud upon the rights of strangers, and consequently, it will not countenance and uphold it in opposition to such rights."

Main vs. Alexander, 9 Ark., 117.

This last case seems to be a thorn in the side of all our opposing counsel. They have plainly seen that unless they can break the force of this decision they have no standing before the Court. Unfortunately, however, the multiplicity of counsel in this case has brought about the same result that too many cooks do to the broth.

One of the counsel for defendant in error in a former brief, said: "We admit that the law of actual notice was repealed as to resident mortgagors." He thereby places the State of Arkansas in the very anomalous position of placing restrictions upon the transfer of personal property by its own residents and yet allowing non-residents the very privilege denied its own. But the distinguished counsel who filed the additional brief in the case seemed to differ very widely from him, and not only assert, "that the general rule is that actual notice is equivalent to registration (*p. 2*)," but endeavored to show (*p. 34*) that this is the rule existing today in the State of Arkansas, and that by the best reasoned decisions in that State (*p. 39*), "notice is equivalent to registration as to all persons." After a most laborious and painful attempt to explain away the long and uniform series of decisions by the Supreme Court of that State to the contrary they finally based their hope upon the decision rendered in 1855, of *Byers vs. Engles, 16 Ark., 543*.

The conveyance in that case was a conveyance of real estate and not of chattels, and was therefore regulated by an entirely different statute from the one touching the case in hand. The statutes construed in *Byers vs. Engles*, are *Sections 670 and 671 of Mansfield's Digest*. It will be seen in *Section 671* that as to subsequent purchasers of real estate actual notice took the place of registration, but the statute on that point was apparently silent as to creditors, putting them upon higher ground than subsequent purchasers, a thing which no Court would permit a statute to do, if any fair construction would permit it to do otherwise. So the Court simply decided

in that case that as actual notice was good in conveyances of real estate against subsequent purchasers, it must also, under that statute, be equally good against creditors that they stood on the same plane. But the Court could not have decided otherwise, no matter what the statute may have been, because not only did the purchaser of the land purchase it and pay for it and get his deed of conveyance for it long before the judgment under which the plaintiff in the case claimed as purahaser was rendered, but he was actually in possession of the premises; and that would have been good anywhere and against anybody or anything. Applying this construction given then to the laws governing recording of deeds of real estate to the laws governing the record of chattels in Arkansas we are enabled to further sustain our position. The ruling in the various cases as to notices by the Supreme Court of Arkansas is in the language of the statute itself, which is as follows:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be *notice* to all persons of the existence of such mortgage."

We see from the very wording of the statute itself that the instrument without recordation constitutes no lien on the property, and that filing shall be the only notice of its existence. Attention is specially called to this construction in *Dodd vs. Parker, 40 Ark., 536*, and *Ford vs. Burke, 37 Ark., 94*. In every other State also where the statute has provided that unrecorded mortgages constitute no lien, a similar construction has been placed upon them.

20 Amer. Eng. Enc., p. 590.

Stansell vs. Roberts, 42 Amer. Dec., 193.

Trader's Nat'l Bank vs. Woodlawn, 96 N. C., 298; 3 S. E., 363.

Travis vs. Bishop, 13 Met. (Mass.), 304.

Ross vs. Menifee, 125 *Ind.*, 432; 25 *N. E.*, 545.

Blevins vs. Bolton, 31 *Mo.*, 437.

With that construction then on *Sec. 4743*, the Legislature of Arkansas in 1877 passed an amendment to its mortgage laws beginning with *Sec. 4750* and ending with *4756*. By this law a mortgage simply filed but not recorded would be good for one year against everybody, but *Sec. 4751* provides that "every mortgage so endorsed and filed shall be void as against the creditors of the person making the same, or against subsequent purchasers and mortgagees in good faith, after the expiration of one year after the filing thereof, unless within 30 days preceding the expiration of one year from such filing and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee, etc."

In that case we see that after the expiration of one year the mortgage is absolutely void as to creditors of every kind, notice or no notice. By parity of reasoning from the case of *Byers vs. Engles*, *supra*, it would be a strange Legislature that would make one sort of a chattel mortgage void against creditors, although they had actual notice of its existence by virtue of seeing it on file in the clerk's office, and yet apply a different rule to a deed filed for record, which did not comply with the prerequisites of a valid and proper recordation of it. It is perfectly clear from the recording act in force in this jurisdiction that general creditors enforcing a lien, and suqsequent purchasers in good faith, are put on the same footing and each has the equal right to take advantage of improperly recorded conveyances. A creditor in such acts is simply defined to be one armed with some legal process which authorizes him to seize the property, such as an attachment, etc.

Bullard vs. Kenyon, 21 *N. Y. Sup.*, 32.

Jones vs. Graham, 77 *N. Y.*, 628.

The rights of an attaching creditor to levy on the property upon which there was an unrecorded mortgage, and one, by the way, given to a non-resident corporation, was recently passed on by the Eighth Circuit Court of Appeals in the case of *Hunter-Hutton-Evans Commission Co. vs. Quigg & Barrenger, 97 Fed. Rep., 735.* The Court says: "Under the statutes of Arkansas, which are in force in the Indian Territory, an order of attachment binds the property of the defendant in the county, which might be seized under it and against him from time of the delivery of the order to the sheriff or other officer," and every chattel mortgage is required to be recorded and it becomes a lien upon the mortgaged property when it is filed and not before that time. *Mansfield's Digest of the Laws of Ark., Secs. 325, 4742, 4743; Cross vs. Tombey, 54 Ark., 179, 181, 182.* The mortgages here in question were never recorded in the Indian Territory and hence they never became a lien upon the property attached unless they were validated, and that lien was created by the possession taken by the mortgagees."

Our statute declares all mortgages of chattles not filed in the county in which the mortgagor resides "void as against creditors," exactly the same wording found in the statute of New York made a mortgage filed in the wrong county void, according to the views of the Supreme Court.

Stuart vs. Platt, 101 U. S., 731.

Cobbey on Chattel Mortgages, Sec. 575.

"At the time the property in this case was attached the sale was void as to the attaching creditor, and the property was therefore, as to him, the property of the vendor, the defendant in the attachment. It was not in the power of the Legislature to divest the lien so created by subsequently declaring the property to be that of the vendee, or by allowing the vendee by proof to establish as to the creditor the validity of a sale declared to be void as to him by the law."

Conrad vs. Smith, 70 N. W. Rep., 817.

"The grantor who has conveyed away his land by an unrecorded deed, it is true, has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, avoids, by virtue of the registry statute, the prior conveyance, and vests title in the subsequent purchaser."

Memphis Land Co. vs. Ford, 7 C. C. A., 304.

Bishop vs. Schneider, 2 Amer. Rep., 540.

Secard vs. Davis, 6 Pet., 124.

Jones vs. Graham, 77 N. Y. 628.,

2 *Cobbey on Chat. Mort.*, Secs. 616, 625, 754.

40 *Central Law Journal*, 27.

(b) *Plaintiff's were Purchasers for Value.*

"As against a deceived vendor, an attaching creditor of the fraudulent vendee is not an innocent purchaser for value."

Taylor vs. Mississippi Mills, 47 *Ark.*, 252.

That was true because, as we have shown above, the attaching creditor must stand on the title in his debtor at the time of the levy. Here was a case for the doctrine of "equities." Applying the same reasoning applied above to Blocker's transfer, no title ever passed to the fraudulent vendee, and there was nothing to levy on. But the converse of that proposition is also true; if the property had been levied on in the hands of the fraudulent vendee as the property of the deceived vendor, the attaching creditor might have occupied the same position as a purchaser for value.

"When the registry shows a title subject to attachment, the attaching creditor, by something of a stretch, is regarded in the light of a *bona fide* purchaser, to whom the recorded deeds have been exhibited, and to whom the conveyance over has been disclosed."

Cooley vs. McLaughlin, 141 *Mass.*, 181; 4 *N. E. Rep.*, 821.

"The attaching creditor stands in the light of the purchaser and is to be protected as such."

Burrell vs. Robertson, 5 *Gillman (Ill.)*, 289.

Green vs. Van Buskirk, 74 *U. S.*, 139.

"So far as knowledge of a previous conveyance affects the validity of the transaction, the attachment of land is like the purchase of it. Both the attacher and the purchaser of land which they know to have been conveyed previously, are alike at fault. What is sufficient notice to one is sufficient to the other.

"Considered as in the nature of a purchaser the attaching creditor is deemed to have made his purchase at the time of the laying of the attachment writ upon the land; for, if execution should follow, the purchaser at the sale would look to the state of things existing when the property was attached."

Waples on Attachments, *1st Ed.*, *p. 501.*

"The policy of the law is to place attaching creditors on the same basis as purchaser for value. The lien of the attaching creditor is deemed to create an equitable title equal to that of a purchaser."

1 Shinn on Attachments, *Sec. 417.*

"A creditor by attaching property, or levying an execution thereon, acquires an interest in the property, which gives him the right to contest a prior mortgage on the ground of fraud."

2 Cobbey on Chattel Mortgages, *Sec. 774.*

VI.

Reasons for Sustaining Curative Acts Do Not Apply to This Case.

In addition to the established rule that such acts can never be construed so as to have the effect of divesting vested rights,

certain other restrictions are thrown around them. They were designed to right wrongs and never to perpetrate them; therefore, they are sustained upon certain worthy and commendable grounds, and they are never extended beyond them.

(a) Always restricted to the parties and those having no higher equities.

We have before endeavored to show that the question of superiority of equities does not enter into this sort of case.

The plaintiffs were no parties to these mortgages, or any transaction out of which they grew. They have not placed themselves in any position which would make it inequitable or wrong for them to take advantage of their defects.

Meigher vs. Strong, 6 *Min.*, 111.

Green vs. Drinker, 7 *Watts & S.*, 440.

Bigelow vs. Topliffe, 60 *Amer. Decs.*, 264.

Barrett vs. Barrett, 26 *S. E.*, 691.

7 *Lawson's Rights and Rem.*, *Sec.* 3868.

Ala. Ins. Co. vs. Barker, 65 *Amer. Decs.*, 349.

Wade on Retroactive Laws, *Sec.* 260.

Black's Constitutional Prohibitions, *Sec.* 207.

Black's Constitutional Law, *p.* 545, *Sec.* 199.

Derninger vs. McDonnell, 41 *Ill.*, 227.

Even if the question of superior equities did enter into this case, the superiority of our lien must still prevail. The same rule would apply here that applies in determining the priority of rights of different attaching or execution creditors. For in any view of the case it is a question of priority of statutory liens.

"The rights of attaching creditors, who, as against their common debtor, have equal claims to the satisfaction of their

debts, must depend on strict law, and if one, by any want of regularity or legal diligence in his proceedings, loses a priority once acquired, it is a case where no equitable principles can afford him relief. Where the equitities are equal, the right must be governed by the rule of law."

Drake on Attachments, Sec. 262.

"The sale was made to Smith and the sheriff's deed executed on the day following. The land had been attached prior to that time, so that the lien of the judgment under which the land was sold related to a time prior to that of defendant's purchase. If, therefore, it should be conceded that he acquired title to the lands in controversy, by his purchase from Earley, he took it subject to the lien of the attachment. It follows, then, that whatever equities he may have must yield to the superior equities of the plaintiff *qui prior est tempore, potior est jure.*"

Hill vs. Baker, 32 Iowa, 311.

(b) Designed to affect only the mode of proof.

Such acts are sustained because they operate on the deed and change the mode of proof. They do for the unwilling debtor what equity and good conscience should compel him to do. He is estopped by an express act of the legislature from taking advantage of a legal technicality in a matter in which he has received full consideration and has nothing to complain of and to take advantage of a thing which would enable him to "eat his cake and have it still"—a violation of principles of sound morality. In short, they are cases where a moral obligation existed, and the legislature gave it legal effect by a retroactive statute. No man has a vested right in a rule of evidence, and so long as a curative act does no more than change that, it is perfectly valid.

Grove vs. Todd, 20 Amer. Reps., 79.

Black on Const. Law, Sec. 154, p. 434, First Ed.

Conrad vs. Smith, 70 N. W., 815.

Summer vs. Mitchell, 10 So. Rep., 562.

Black's Constitutional Prohibitions, Sec. 210.

Wade on Retroactive Laws, Sec. 258.

Hulbert vs. Hendrix, 26 S. W. Rep., 911.

In passing curative acts the legislature only assumes to do for the debtor what he might have been compelled to do by a Court of Chancery. Nobody would contend that the court, in compelling a man to cure defects in such matters, could go further and destroy the force and effect of intervening liens or incumbrances.

"If the official is dead or cannot be found, or if his term of office has expired, the aid of equity may be invoked to correct the mistake by reforming the certificate of acknowledgement so that it will conform to the facts in the case."

Underhill on Evidence, Sec. 136.

"For if, argued the Court, as the statute created no new title, and affected no new rights, but such as equitably flowed from the grantor, and only accomplished what, upon the principles of justice, a Court of Chancery ought to decree, there could be no sound objection to its retroactive operation."

Black's Constitutional Prohibitions, Sec. 210.

Simpson vs. Montgomery, 25 *Ark.*, 370.

(c) *Valid when they only take away the right of a party to avoid his own contract.*

This proposition is so intimately connected with the foregoing that the authority to sustain it may be plentifully found in authorities already cited.

(d) *Valid when they merely affect the remedy.*

What was previously said with reference to rules of evi-

dence, is applicable to remedies. A man has no vested right in a remedy, and can acquire none, until he prosecutes his rights under it to judgment. Then they are protected as all other vested rights. Having prosecuted our claim to judgment, our rights under the remedy were complete. Therefore, the new act could not affect the remedy, but if anything, our completed and perfected lien, which is property.

"A lien is a right of property, not a mere matter of procedure."

Rodd vs. Heartt, 88 U. S., 558 L. Ed., 663.

VII.

If the Curative Act Went Further It Would Be a Usurpation of Judicial Power.

The several departments of the Federal Government are separate and distinct. The functions of each are well defined, and the Constitution does not permit any one of them to usurp the powers of either of the others.

If the contention of the interpleader in this matter is correct, it is in effect saying that a deed which was fraudulent at the time the attachment was issued, and was so at the time it was sustained, shall not be so in this case, but a judgment which was correctly rendered, and was perfectly valid when rendered, is set aside and a legislative new trial is granted. The policy of the law is not changed. Chattel mortgages still remain fraudulent and void as to creditors and subsequent purchasers, unless put on record in the manner prescribed by statute, but we will give these people a legal advantage which those who went before never had, and which those who come after shall not have.

Ogden vs. Blackledge, 2 Cranch, 272.

Chestnut vs. McShane, 16 Ohio, 558.

Lawson vs. Jeffres, 47 Miss., 686.

Burt vs. Williams, 24 Ark., 91.

Atkinson vs. Dunlap, 5 Me., 111.

Bumbach vs. Singer, 56 N. W., 873.

Allison vs. Louisville Ry., 9 Bush., 248.

Menzes vs. Deutzler, 33 Penn. St., 495.

Burch vs. Newberry, 10 N. Y., 374.

Black's Constitutional Prohibitions, Secs. 199, 209.

Wade on Retroactive Laws, Sec. 158.

Sidway vs. Lawson, 58 Ark., 121.

3 Amer. Eng. Enc. of Law, 682.

Ratcliffe vs. Anderson, 31 Amer. Rep., 720.

VIII.

The Amendment was a Partial Repeal of the Old Statute, and Liabilities Incurred Under it Remained Unaffected.

If it is construed only as an amendment and as not repealing in any respect the former law it must be construed prospectively.

If simply an amendment, the original act continues in force with regard to all rights that had accrued prior to such amendment.

Thatcher vs. Brd. Steuben Co., 47 N. Y. Sup., 124.

"The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along, and the new parts, or the changed portions, are not to have been taken to have been the law at any time prior to the passage

of the amended act. The change takes effect prospectively according to the general rule."

Southerland on Statutory Construction, Sec. 133.

See also:

Ely vs. Hutton, 15 N. Y., 595.

But the same author says that the provisions of the former derive their force thereafter solely from the amendatory act.

Under the old statute all chattel mortgages given by non-residents and not accompanied by delivery of possession to the mortgagee or his agent were in law fraudulent and void in this jurisdiction, except between the parties, because they could not be recorded. The new act supplied this defect and that far repealed the old statute. Both being acts of Congress, all rights accrued under the law are protected.

Rev St. U. S., Sec. 13.

Wade on Retroactive Laws, Secs. 292, 298.

Fabri vs. Murphy, 95 U. S., 191, Law Ed., 468.

Files vs. Fuller, 44 Ark., 281.

No Federal Court has ever been called on to construe the forgoing section of the Revised Statues when applied to a civil liability, but several of the State Courts have.

The State of Indiana has the same statute, word for word. Its Supreme Court has decided that rights like ours, leaving out altogether the question as to whether they are vested or not, cannot be lost, either by an amendment or repeal of the law under which they were acquired.

Daggy vs. Ball, 34 N. E., 247.

United States vs. Williams, 19 Pac., 288.

Wade on Retroactive Laws, Sec. 297.

IX.

If Retroactive, It Impaired a Contract.

It is true there is nothing in the Constitution of the United States inhibiting Congress from passing laws impairing the obligation of contracts, and many laws passed by Congress under express authority conferred on it have been sustained by the Court, although their effect was to incidentally and indirectly impair the obligation of contracts, such as bankrupt laws, etc. But no one would contend that Congress could pass a law whose sole and necessary effect would be to impair the obligation of a contract.

Waples on Homesteads, p. 279.

2 Beach on Mod. Contract Law, Sec. 1633.

Is a judgment such a contract?

"The judgment recovered by Anderson against Ratcliffe was a contract of the highest nature, and any legislature which authorizes a Court to reopen that judgment and reduce it in amount necessarily impairs its obligation."

Ratcliffe vs Anderson, 31 Amer. Rep., 721.

Black on Constitutional Prohibitions, Secs. 130, 131.

Bishop on Contracts, Sec. 556.

X.

The Original Act Was Not in Violation of Section 2 of Article IV of the Constitution.

As we have said before, the interpleader endeavored to record its mortgages in the Northern District of the Indian Territory, although the mortgagor was a resident of the State of Texas. A mortgage so recorded has been held to constitute no lien by the Supreme Court of Arkansas.

Watson vs. Thompson Lumber Co., supra.

Stuart vs. Platt, supra.

The interpleader in the trial below introduced proof to show that J. R. Blocker, the mortgagor, was also a citizen as well as a resident of the State of Texas, and that inasmuch as the act provided a place for the recordation of mortgages of residents, and none for non-residents, it deprived the mortgagor of the privileges and immunities guaranteed by the *Second Section of Article 4, of the Constitution of the United States.* Both precident and reason are against this position, even if the laws were being attacked in the State of Arkansas. Such laws have existed in many of the States and been upheld without ever being attacked for any such reason.

Jones on Chat. Mort., Sec. 26.

Stewart vs. Smith, 14 N. W., 310.

Montgomery vs. Wright, 8 Mich., 143.

II. Cobbey on Chat. Mort., Secs. 575, 578.

Smith vs. Moore, 11 N. H., 55.

Blaver vs. Frick Co., 53 Ark., 18.

Indeed, the principle case upon which the Court below relied was from the Supreme Court of Indiana declaring a law depriving non-residents of the privilege of becoming trustees void. That same Court has held a law like ours good.

Granger vs. Adams, 90 Ind., 87.

The privileges and immunities guaranteed therein are those which belong to citizenship, and which belong of right to the citizens of all free governments and are not intended to give to the law of one state any force in another state, nor are special privileges enjoyed by citizens in their own states secured in other states thereby. No privileges are secured by this Article of the Constitution except those which belong to citizenship. It simply means that citizens of each state can in

any other state hold property by the same titles by which every other citizen may hold it, and that no law must be passed which would place any citizen of any state in a worse situation than a proper citizen of a particular state.

Conner vs. Elliott, 18 How., 591.

Lemmon vs. The People, 20 N. Y., 608.

This law did not discriminate against citizens, but against residents of the same state. It was not such a law or immunity of the State of Arkansas when it was in force there, because it denied the right of one resident to record a mortgage of property in any other county than that of his residence.

Redd vs. St. Francis Co., 17 Ark., 422.

In other words the law relates only to residence, and not to citizenship.

Cent. Ry. Co. vs. Ga. Ry. Co., 11 S. E. Rep., 192.

In the recent case of *Blake vs. McClung, 172 U. S.*, 239, a question arose about rights of residents and non-residents. But the court there decided that it involved more than that, asserting that the statute discriminated against citizens of other states, and while that case is not at all against the conclusion reached in this case, we think the statements of Mr. Justice Brewer, in his dissenting opinion, so clearly present the distinction involved in our case, we quote one paragraph from it:

"So that neither the statute, the pleadings, nor the decree, raised any question of citizenship, or gives any priority outright to citizens of Tennessee, or of citizens of other states, but only discriminates between residents and gives residents of the state priority."

Non-residents and citizens of other states were not deprived of any property right. They were not debarred from taking mortgages on property in a state, of acquiring property

or of securing their debts. They simply had to take possession of the property instead of being able to record their mortgages. The object of the recording act was never to confer any benefit upon mortgagors, but to confer a benefit upon creditors and subsequent purchasers, both resident and non-resident, in preventing fraud and deception by precluding the mortgagor of personal property from holding himself out to the world as an unqualified owner of property which had been conveyed by a mortgage. It merely says to the mortgagor that he must either give possession to the mortgagee or give notice to his creditors and those who may become his creditors of his transfer by recording the mortgage as required by the statute.

Mr. Justice Clifford says in *Ward vs. Md.*, *12 Wall.*, *418*:

"Beyond doubt, those words (privileges and immunities) are words of very comprehensive meaning, but it will be sufficient that the clause plainly and unmistakably secure and protect the rights of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce without molectation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the United States and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Certainly none of these things were prevented or impaired by the provision of law under consideration.

The property of a non-resident under the laws of almost every State in the Union may be attached without the right of exemption which is accorded to a resident of the State. So a statute dispensing with a bond in attachment proceedings where the defendants are non-residents, or requiring bond of non-residents before bringing suits, have, in numberless cases been held valid and no violation of the federal constitution.

Pyrolusite-Manganese Co. vs. Ward, *73 Ga.*, *491*.

Head vs. Daniels, *38 Kan.*, *9*.

A similar matter was recently passed on in *Central Loan & Trust Co. vs. Campbell Commission Co., 173 U. S., 98.*

In Oklahoma, where this case arose no bond was required in cases of attachment against a non-resident. Counsel for the non-resident contended that where non-residents "are not capable of separate identification of residence by any fact or circumstance other than that they are non-residents, the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification." The Court in replying said: "The misconception consists in conceding on the one hand the power to classify residents and non-residents for the purpose of the writ of attachment and then from this concession to argue that the power does not exist unless there be something in the cause of action for which the attachment is allowed to be issued which justifies the classification. As, however, the classification depends on residence and non-residence and not upon the cause of action, the attempted distinction is without merit." So have laws been held valid providing that the statute of limitation should run against a person if he resides in the State, but not if he resides out of the State.

Chenning Canal Bank vs. Lowery, 93 U. S., 72.

Various other discriminations against non-residents similar to the one under consideration have invariably been upheld by the Court because it is merely an exercise of those powers of police that were reserved to the states at the time the original constitution was adopted.

Cummings vs. Mingo, 10 S. E., 110.

State vs. Dent, 129 U. S., 114.

Garzza vs. Tierman, 148 U. S., 657.

Black on Const. Law, p. 228.

Cribbs vs. Benedict, 44 S. W., 710.

Taggart vs. Claypool, 44 N. E., 18.

Lee vs. Lyde, 20 So., 410.

6 *Amer. Eng. Enc. of Law*, 2d Ed., 69.

Thorpe vs. Ry. Co., 27 Vt., 149.

State vs. Randolph, 31 Pac., 201.

Reno on Non-residents, p. 16, Sec. 15.

Col. Pollard on pages 63 and 69 of his brief ridicules our contention that the registration laws are passed by virtue of the powers of police possessed by the sovereignty passing them. After satisfying himself thoroughly of the absurdity of our position, he says: "From all which one must indeed have a very viv d imagination if he can place within the category mentioned, a registration Act." We are glad to be able to shift the responsibility; for this error we are indebted to this Court. In the case of *Pycatt vs. Powell*, 51 Fed., 551, this Court was called upon to consider a mortgage made, executed and recorded in the State of Kansas, securing a debt upon property which was subsequently removed to the Indian Territory. That case came on for trial prior to the passage of the Act of Congress extending over this Territory any statute for the registration of mortgages. In discussing the effect of the registration of this mortgage in Kansas this Court said: "The registry Act of Kansas was in the nature of a police regulation of that State." We thought that was the law before we saw it written there, and Col. Pollard to the contrary, we think so yet.

The Indian Territory is not an organized Territory and derives its law direct from Congress, and the United States therefore exercises this police power over it.

United States vs. Dewitt, 9 *Wall*, 41.

Such statutes, no matter how passed, are but the regulations of the manner of transferring property and not a restriction upon its transfer.

Burlington vs. Grosvenor, 46 Kan., 730.

Even if we should admit that the law was unconstitutional as a law of the State of Arkansas it certainly cannot be unconstitutional as a law of the United States in force in the Indian Territory. The constitutional provision in question simply prevents each state from discriminating in favor of its own people or against those of any other state.

Davis vs. Peirse, 7 Minn., 13.

Paul vs. Virginia, 75 U. S., 168.

Scott vs. Sandford, 60 U. S., 393, p. 15 L., Ed. 69.

Our statute is not now a law of Arkansas, but a law of the United States, and the constitution has not the same force and effect in the territories and especially the Indian Territory, that it has in the states. The Indian Territory was not organized under the Constitution. It was a creation of the treaty-making power on the first hand and the legislative department on the other, and both under the general law as well as the treaties made with the Indians is subject to the supervision and control of the legislative department. All functions of government are within legislative jurisdiction of the Congress, certainly so far as citizens of the United States are concerned, and all territorial powers are subject to Congressional supervision.

Snow vs. United States, 18 Wall, 319.

Benner vs. Porter, 9 How., 242.

National Bank vs. Yankoln, 101 U. S., 132.

Murphy vs. Ramsey, 114 U. S., 44.

Talbot vs. Silver Bow Co., 139 U. S., 446.

Endleman vs. United States, 86 Fed. Rep., 459.

Shurly vs. Bowlby, 152 U. S., 48.

Mormon Church vs. United States, 136 U. S., 42.

The civil rights of the inhabitants of the Indian Territory are those guaranteed by treaty and conferred by Congress. They acquire no such rights under the Constitution and Federal Statutes *ex proprio vigore*. In the recent treaty with Spain the following expression is found: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." It may be said that such inhabitants would not then be citizens of the United States. One-third of the inhabitants of the Indian Territory are not citizens of the United States and no residents who have their domiciles here are citizens of any state. It is true that the Act of Congress of 1890, which adopted and put in force in the Indian Territory the laws which we are now considering, also extended over the Indian Territory the Constitution of the United States. But in doing so it has conferred those rights, if they did not have them before, upon the inhabitants of the territories that it confers upon all persons under the protection of the United States Government as such, and not those rights which the Constitution confers upon citizens of states as such.

The Supreme Court of Illinois in *People vs. Loeffler*, 51 *N. E.*, says:

"There is a difference between the privileges and immunities belonging to the citizens of the United States as such and those belonging to the citizens of each state as such. The privileges and immunities of the citizens of the several states are those which concern the personal private rights of the citizen. The Supreme Court of the United States has said that they may all be comprehended under the following general heads: 'Protection by the Government with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety is nevertheless to such restraint as the Government may prescribe for the general good of the whole.'"

Slaughter House Cases, 16 Wall., 36.

See also recent decision of Supreme Court, *Maxwell vs. Dow, Adv. Sheets No. 9, Mch. 15, 1900, p. 449.*

The 14th amendment deals with the rights of citizens of the United States as such, while the 4th article protects rights founded in the relation between the States and its citizens and not rights which belong to the citizens of the United States as such.

Conner vs. Elliott, 59 U. S., 591, 15 L. Ed., 49.

Black on Constitutional Law, pp. 227-229.

Justice Brewer in 136 *U. S.*, 44, has said with reference to the application to the Constitution in the territories that:

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions."

The inhabitants of a State have a dual citizenship, State and Federal. The article of the Constitution under consideration guarantees to "the citizens of each State all the privileges and immunities of the citizens of the several States." But this inter-state citizenship is only granted to citizens of a State, not to citizens of the United States not also citizens of a State. There is no citizenship of a territory, and the only citizenship its inhabitants and residents have, or which Congress can confer, is national.

Prentiss vs. Brennon, Fed. Cases No. 11, 385.

United States vs. Cruikshank, 92 U. S., 542.

Piquet vs. Swann, Fed. Cases No. 11, 134.

It is perfectly plain, therefore, that unless a law deprives the inhabitants of a territory of some property or vested right, or personal liberty without due process of law, that Congress has plenary power of legislation over them.

Wharton Amer. Law, Sec. 464.

Sutherland on Statutory Construction, Sec. 23.

Thompson vs. Utah, 170 U. S., 349.

Cole vs. Cunningham, 133 U. S., 107.

As we have before said, this recording law only affected the residents of the counties, and was not intended to affect the property rights of anybody. The State thereby protected residents of one county from fraud and deceit from residents of other counties, and incidentally, non-residents of the State. The law bears equally upon all the citizens of the States.

Chief Justice Waite in *Nat'l Bank vs. Yankton, 101 U. S., 129*, says: "The territories are but political sub-divisions of the outlying dominion of the United States. They bear much the same relation to the general government that *counties* do to the States, and Congress may legislate for them as States do for their respective municipal organizations." If, therefore, States can make laws with reference to their own citizens' rights in their counties, Congress can make the same laws valid when put in force over a territory. The learned Judge who tried the case below contended that Congress could not prohibit the citizens of the states from doing business in the Indian Territory, unless the prohibition extended equally to the residents thereof.

The complete answer to that contention and this whole matter is found in the various sections of the *title 28, chapters 3 and 4 of the Revised Statutes of the United States*, and notably *Sections* 2117, 2128 to 2136.

Respectfully submitted,

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